UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

BENJAMIN WEY and
SEREF DOĞAN ERBEK,

Defendants.

Crim. Action No.: 15-CR-00611 (AJN)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT BENJAMIN WEY'S FIRST DISCOVERY MOTION

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Defendant Benjamin Wey submits this memorandum of law in support of his motion for an Order requiring the Government to (i) provide bill of particulars, (ii) promptly disclose and identify *Brady* and *Giglio* material, (iii) promptly identify the documents upon which it will rely at trial, and (iv) disclose Jencks Act, 18 U.S.C. § 3500 ("3500"), material and its witness list by no later than December 6, 2016.

Preliminary Statement

Mr. Wey is facing eight felony counts of conspiracy, securities fraud, wire fraud and money laundering, related to the allegedly fraudulent manipulation of the common stock of three NASDAQ-traded China-based companies. The purported scheme was allegedly perpetrated during some part of a five year time-span, beginning nine years ago, and ending five years ago. Beyond that, however, the 23-page Indictment informs Mr. Wey of essentially nothing regarding what, specifically, he (or anyone else) *actually did* that constitutes the alleged fraudulent market manipulation. The Indictment identifies virtually no specific trading activity, no artificial price movement, no false statement, no market impact, and no other manipulative behavior to which those charges are addressed. The two wire fraud counts fail to identify a single wire transmission constituting those offenses; the two securities fraud counts fail to identify a single trade; and the money laundering counts fail to specify a single money transfer.

To make matters worse, the Government has buried the defense in over five *terabytes* of electronic evidence – including hundreds of thousands of pages of bank and securities account statements from dozens of third parties and raw trading data concerning literally *millions* of trades – and has informed the Court that its trial presentation will take four to six weeks.

Practically speaking, Mr. Wey has been left to guess what wrong(s) he is charged with committing and to somehow locate needles in a virtual field of haystacks to predict what transactions the Government will claim at trial were manipulative. This amounts to nothing short of trial by ambush, and violates Mr. Wey's basic constitutional right to know and understand the charges against him to enable him to prepare a defense.

Any market manipulation case is highly complex, and requires detailed expert market and trading analysis, which are both costly and time consuming. As this case is currently postured, the Government is effectively requiring the defense to analyze every tick of the price of three separate, actively traded stocks – stocks that traded on a major exchange in hundreds of thousands of shares a day, and indeed *millions* of shares on some days, and that were broadly purchased by mutual funds and other major institutional investors – over a *five year* period. That would be an insurmountable task for anyone.

And the clock is ticking: the Court has set a firm trial date and a motion briefing schedule. On several prior occasions the defense has raised with the Government that the Indictment is insufficient and that a bill of particulars is required. The Government initially promised to supersede and then failed to do so. Then, in response to a written request for particularization of the allegations, the Government flatly declined to provide a bill of particulars. Accordingly, Mr. Wey is constrained to move for relief from the Court.[1]

Relatedly, the vast trove of discovery produced by the Government further merits an Order requiring the Government to identify the documents upon which it will rely at trial and produce and identify evidence pursuant to its obligations under *Brady v. Maryland*, *Giglio v. United States*, and their progeny. In a unique case like this, where the Government has produced an impenetrable amount of discovery, the Constitution, the Federal Rules, and basic concepts of

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1 At the December 14, 2015 conference before the Court, Your Honor set a deadline of May 27, 2016, for the filing of pretrial motions. But the Court at that time also encouraged the defense, if practicable, to split up the motions, and submit some portion of them at an earlier time. (*See* Siegal Decl., Ex. C. at 12:17-22) Consistent with the Court's suggestion, Mr. Wey hereby makes these discrete discovery-related motions now, while reserving his right to file further motions (including motions to suppress certain evidence, to challenge the viability of the charges, and perhaps make other applications related to distinct discovery issues), on or before May 27 or such later date as necessary.

fairness obligate the Government to identify the Rule 16 and *Brady/Giglio* material within that discovery.

The Government should similarly be required to produce 3500 material, as well as a trial witness list, at least 90 days before trial. Given the acknowledged and unique complexity of this case, it would be unconstitutional and unfair for the Government to withhold its witness list and 3500 material until the eve of trial (especially where trial is set for 18 months after arrest). With the Government expecting a four to six week trial, Mr. Wey's defense cannot adequately prepare for the numerous witnesses the Government expects to call without timely notice of their identities and a sufficient opportunity to review those witnesses' prior statements. Nor is there any compelling reason to withhold this information in this case.

In sum, Mr. Wey is left with a hopelessly bare Indictment, millions of documents, a complex case theory, and little idea of what the Government's proof is going to look like. He must be afforded the opportunity to know and understand the nature of the charges against him in order to adequately prepare his defense and avoid unfair surprise at trial. He must be provided with such information and materials sufficiently in advance of trial to make use of it. Mr. Wey thus respectfully requests that the Court order the Government promptly to provide a bill of particulars, consistent with the targeted requests set forth herein, as well as the additional discovery-related relief requested.

Relevant Background Facts

Government's Investigation

The FBI began investigating Benjamin Wey beginning no later than June 2011. On or about January 25, 2012, the FBI executed two search warrants, one at Mr. Wey's place of business, and later that day, at his family home.[2] On September 10, 2015, after an investigation lasting more than four years, Mr. Wey was arrested at his home pursuant to the Indictment. A named co-defendant and alleged co-conspirator, Seref Doğan Erbek (a resident of Switzerland) was not arrested and remains at large.

The Indictment

The Indictment asserts that Mr. Wey, Mr. Erbek, and "others known and unknown" were involved in a scheme that consisted of:

(i) Mr. Wey amassing undisclosed holdings of in excess of five percent of the stock of three companies, and

(ii) fraudulently manipulating the price and demand for the stock of those companies.

(Siegal Decl., Ex. A, ¶ 7)

Subject Companies

The operations of the companies that are the subject of the charges against Mr. Wey are three NASDAQ-listed, China based companies: SmartHeat, Inc. ("SmartHeat"), a company that produces energy efficient heat exchangers (products that reduce pollution for a greener environment); Deer Consumer Products, Inc. ("Deer"), one of the world's largest manufacturers and sellers of small kitchen appliances such as blenders and juicers; and CleanTech Innovations, Inc. ("CleanTech"), a company in the wind turbine tower industry. (Siegal Decl., Ex. A, ¶¶ 4-6)

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[2] The propriety and constitutionality of those searches will the subject of a separate suppression motion the defense anticipates filing on or before May 27, 2016, pursuant to this Court's scheduling Order. Relatedly, the Government has informed us that they now want to re-review certain documents that they had previously tagged as potentially privileged. We stated our objection to this review to the Government, and requested that the Government provide us with those documents so that we could evaluate them and bring a motion to prevent this review – which would potentially taint the entire prosecution of Mr. Wey. The Government confirmed that they would await our motion before reviewing these documents. We recently received these documents and are currently processing them. Our objection to this review of privileged materials will also be part of the May 27 motion.

According to the Indictment, Mr. Wey's company, NYGG, identified Chinese companies that wished to access the United States capital markets: each of SmartHeat, Deer, and CleanTech, with the help of NYGG, became publicly traded on the U.S. OTC Bulletin Board through reverse mergers. (Siegal Decl., Ex. A, ¶ 10) The companies then applied for listing on the NASDAQ stock exchange. NASDAQ approved the listing application for each company, after which each company began trading on NASDAQ. (Siegal Decl., Ex. A, ¶ 17)

Trading Time Frame

The Indictment claims the alleged market manipulation occurred between 2007 and 2011. (Siegal Decl., Ex. A, ¶¶ 7-9) Bloomberg L.P. trading records reflect that two of these securities – SmartHeat and Deer – traded actively in hundreds of millions of shares, worth billions of dollars over the Indictment's alleged five year time span.[3] Between the fall of 2009 and early 2011, SmartHeat, which had up to 33 million shares issued and outstanding, often traded hundreds of thousands, and sometimes *millions* of shares each day (as much as 6 million), totaling over 300 million shares over the allegedly relevant time period. Similarly during the same timeframe, Deer, which had 34 million shares issued and outstanding, averaged hundreds of thousands of shares traded, traded more than 4 *million* shares in a single day, and also traded more than 300 million shares over the Indictment's time frame. At times, over $40 million in Deer or SmartHeat shares changed hands in a single day. Moreover, for significant periods of the allegedly relevant timeframe, these stocks were held in substantial part – as much as 40% of their entire outstanding shares – by major global investment funds like Fidelity Investments, Janus Capital, Apollo Management, BlackRock, Oppenheimer Funds and many others.Deer's and SmartHeat's market capitalization each exceeded $600 million at times. In short, these were

[3] Cleantech traded for only one month before it was wrongfully delisted by NASDAQ. *See* http://bit.ly/1V3Mee0.

highly liquid, NASDAQ-listed securities, broadly held by some of the most sophisticated financial institutions in the world.

Alleged "Manipulation of the Issuers' Stock Prices"

The crux of the Government's case – charged as securities fraud, wire fraud, and conspiracy – is that Mr. Wey participated in the manipulation of the stock price for SmartHeat, Deer and CleanTech. (Siegal Decl., Ex. A, ¶ 7) The Government claims that Mr. Wey, Mr. Erbek, and "others known and unknown, caused the share price of its stock to be manipulated in various ways." (Siegal Decl., Ex. A, ¶ 18) However, the Indictment plainly does not provide Mr. Wey with notice of the "various ways" in which he (or anyone) allegedly manipulated stock prices. In fact, the Government has only alleged three transactions during that entire five year time span – not three transactions per issuer, but rather, *three transactions in total* – that could even arguably be considered "manipulation": two single trades in CleanTech, and one vague allegation that two unidentified brokers solicited their customers to buy (unspecified) stock:

Stock	**Allegation(s) of Manipulation**
Deer	• None
SmartHeat	• None
CleanTech	• That, on February 7, 2011, Mr. Wey sent an email to Mr. Erbek stating that CleanTech had just traded at $4.50 per share, and stating: "Please make sure the trader buys the stock at $5 per share, stay at $5 per share bid price, not less. Please make sure this happens right away." (Siegal Decl., Ex. A, ¶ 18) • That in or about early July 2010, Mr. Wey "caused the purchase for a U.S. brokerage account in the name of Wey's Sibling of approximately 1,000 shares of CleanTech stock, while also causing a Singapore brokerage account in the name of one of the Nominee Entities to sell the exact same number of shares." This trade, which came was purportedly executed at a price "70% above" the "$3.00 initial offering price."After this alleged "match trade," Mr. Wey used email to allegedly "tout to prospective investors the apparent 70% increase in CleanTech's stock price." (Siegal Decl., Ex. A, ¶ 19)

Unidentified	• Mr. Wey "caused two retail brokers located in Manhattan to solicit their customers to buy shares of common stock of the Issuers, often on margin, while those brokers simultaneously actively discouraged the sale of these stocks by their customers." (Siegal Decl., Ex. A, ¶ 18)

And the Indictment nowhere describes what impact, if any, these three allegedly manipulative "acts" had on the market for any security.

Alleged Failure to File SEC Form 13D

The Indictment alleges that Mr. Wey "caused certain entities that were owned or otherwise associated with [i] a sibling of [Mr. Wey], [ii] certain other members of [Mr. Wey's] extended family, and [iii] employees of NYGG-Asia[4] . . . to obtain a substantial portion of the shares of certain U.S. shell companies . . . ." (Siegal Decl., Ex. A, ¶ 8) It further alleges that Mr. Wey "routinely directed" Mr. Erbek "to conduct stock trading for accounts held in the names of the Nominees."[5] (Siegal Decl., Ex. A, ¶ 9)

The Indictment also alleges that, if the share holdings of all the "Nominees" were to be aggregated, those holdings would equal greater than 5% of the outstanding shares for an issuer. (Siegal Decl., Ex. A, ¶ 13) Pursuant to SEC Regulation 13D, the Indictment contends, an individual must file form 13D to report ownership of more than 5% of the outstanding shares of a stock within 10 days of the acquisition of shares in excess of five percent. (Siegal Decl., Ex. A,

[4] NYGG-Asia is not to be confused with Mr. Wey's company in New York: NYGG.

[5] The Government has met with Mr. Erbek or his counsel on at least two occasions (October 2015 in New York and January 2016) subsequent to Mr. Wey's indictment, but has not arrested Mr. Erbek. According to the Government, on both of these occasions, the Government obtained information exculpating Mr. Wey. While the details of these meetings are beyond the scope of this motion, in general Mr. Erbek has emphatically stated (supported by documentation) that he never conducted *any* trading for Mr. Wey (much less any manipulative trading) and never engaged in any criminal conspiracy.

¶ 14) Counts Five and Six assert that Mr. Wey was obligated, but nevertheless failed, to make 13D filings with respect to Deer and CleanTech, respectively.[6] (Siegal Decl., Ex. A, ¶¶ 33-36)

The Indictment does not specify the identity of these "Nominees," or how Mr. Wey "caused" them to obtain stock in Deer and CleanTech. Nor does it specify *when* Mr. Wey is alleged to have failed to file the 13D forms (*i.e.*, when shares in excess of 5% were held) but instead provides nebulous timeframes: "[f]rom at least in or about April 2009 through at least on or about September 20, 2010" for Deer, and "[f]rom at least in or about December 2010 through at least in or about December 2011" for CleanTech. (Siegal Decl., Ex. A, ¶¶ 34, 36)

Alleged Failure to Meet NASDAQ's "Round Lot Shareholder" Requirement

Management of SmartHeat, Deer, and CleanTech sought listing on a U.S.-based stock exchange and decided to pursue a listing on NASDAQ. (Siegal Decl., Ex. A, ¶ 15) NASDAQ publishes its listing requirements, which include a plethora of financial and management requirements, along with a requirement that the company have 300 "round lot shareholders" (meaning shareholders of at least 100 shares). *See* NASDAQ Initial Listing Guide, available at https://listingcenter.nasdaq.com/assets/initialguide.pdf. The Indictment alleges that, in an effort to meet this listing requirement, Mr. Wey "caused shares of some of the Issuers to be transferred from certain of the Nominees to dozens of [Mr. Wey's] friends, employees, and business associates and/or their family members as gifts or unsolicited bonuses,"[7] including "some

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6 In *Brady* material recently produced by the Government, it was revealed that Credit Suisse researched the 13D issue with respect to accounts handled by Mr. Erbek and reported to Mr. Erbek that no 13D forms needed to be filed. It is unclear how Mr. Wey could be *criminally liable* for any failure to file a form 13D when one of the largest banks in the world researched the issue and concluded that no filing needed to be made.

7 While the Government apparently expects this to somehow sound nefarious, it does not cite any law that prohibits gifting shares to "friends, employees, and business associates and/or their family members" to meet the round lot shareholder requirement.

instances" where shares were issued in the names of individuals "who never actually received the share certificates or who had no idea they owned such shares." (Siegal Decl., Ex. A, ¶ 17)

The Indictment does not specify which issuer(s) was the subject of such conduct; who the alleged recipients were of the gifted shares; which shareholders allegedly did not receive stock certificates; or which shareholders allegedly did not know they owned shares. Presumably, the ultimate list of shareholders for all three issuers exceeded 300 people, as each company attained listing status on NASDAQ.

Alleged Money Laundering

With respect to money laundering, the Indictment asserts that "from in or about 2007 through in or about 2011 . . . stock and cash generated from sales of" stock were "transferred from accounts located in the United States in the name of Wey's Sibling and certain of the Nominees to accounts located overseas," and was then "repatriated to the United States for the benefit of" Mr. Wey. (Siegal Decl., Ex. A, ¶¶ 21, 22) While the Indictment asserts that $20 million was transferred from "a Hong Kong account" in the name of Mr. Wey's "Sibling" to "bank *accounts*" controlled by Mr. Wey or his wife, it provides no other facts, dates or even timeframes, identifies no transfers, specifies no dollar amounts of any of these transfers, and provides no other clues as to what transactions the Government will seek to prove constitute either of the two substantive counts of money laundering. (Siegal Decl., Ex. A, ¶¶ 21-22, 37-40 (emphasis added))

Post Indictment Discovery and Procedural Events

Mr. Wey's counsel first raised the issue of the Indictment's patent lack of detail at the December 14, 2015 Court conference. At that time, defense counsel remarked: "we will probably be making a motion for a bill of particulars, given how little specificity is in the Indictment." (Siegal Decl., Ex. C at 8:19-23) The Government at that time noted that it intended to file a superseding Indictment shortly, and the Court set a deadline of February 15, 2016 for the Government to do so. (*Id.* at 4:17-19)

Beginning in October 2015 and continuing in several tranches over the past several months, the Government has to date produced more than five terabytes of data, totaling *over three million documents* (the exact number is virtually uncountable due to the sheer volume). Moreover, the Government further acknowledges that it still has additional documents and information to produce. Among the documents already produced are tens, if not hundreds, of thousands of pages of banking and brokerage accounts for third parties – more than 1,800 monthly account statements. The Government has also produced "Blue Sheets"[8] detailing every electronic market trade in each of three stocks for several years. The Blue Sheet data produced by the Government to date (which may still be incomplete as of this writing)[9] is so voluminous that an effort to open the file containing the data on a normal desktop computer frequently crashes the viewing program, or simply fails to open. Third party vendors with special programming capability are required just to access the data, much less analyze it. Without more detail regarding the specific trades the Government believes support its manipulation allegations, it is virtually impossible to utilize this material to prepare a defense.

Beyond the trading and account records, among the tens of millions of pages produced by the Government are hundreds of SEC filings, thousands of emails among dozens of individuals

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8 Blue Sheets provide trade-level detail for each market-reported trade, including trade date and time, price, quantity, settlement date, and counterparty identification information for every set of shares exchanged electronically on the open market anywhere in the world.

9 Although it was unclear initially (because the form in which the data was produced was technically difficult to access), it turned out the Government's initial production of Blue Sheet data was incomplete in that it was missing several months' worth of trading records. After the defense brought this issue to the Government's attention on March 8, 2016, the Government then made a supplemental production of additional such data, but suggested it might yet make a further supplemental production. To date the Government has not yet made a further production of Blue Sheet data (or certified that its production is now complete).

and entities, immigration records, letters, phone records, and multiple camera security video from a FedEx location, to name a few.

At the February 15, 2016 deadline for doing so, rather than supersede, the Government requested a 60-day extension, to April 15, 2016, despite the fact that defense motions were scheduled to be filed no later than May 27. (Doc. No. 33) Objecting to that request, Mr. Wey's counsel made clear that the timing of any superseder would be "critical to [its] ability to effectively review the voluminous discovery material and to formulate our pretrial motions" because "the current indictment in this case is hopelessly bare." (Doc. No. 34) The Court granted a 30 day extension (instead of the Government's requested 60 days), but ultimately the Government elected not to supersede.[10] (Doc. No. 35)

On March 8, 2016, with the motion deadline approaching, and in the absence of a more detailed superseding indictment, the defense wrote to the Government detailing the types of additional information required to put Mr. Wey on adequate notice of the charges. (Siegal Decl., Ex. D) To support this request, the defense outlined the Indictment's deficiencies, made targeted requests for more specific information related to the charges, and provided the Government with relevant legal support. (*Id.*) Many of the requests made in the defense's March 8 letter mirror the requests Mr. Wey is forced to make through this motion today.

On April 7, 2016, the Government informed the defense that it did not intend to provide the requested bill of particulars, and otherwise largely ignored Mr. Wey's requests.[11]

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[10] Instead, the Government has suggested that it may file a separate case containing additional charges against Mr. Wey that it might otherwise have included in this case. (Doc. No. 36) Mr. Wey reserves the right, at the appropriate time, to object to such a filing as, among other things, a flouting, if not a direct violation, of this Court's clear Orders.

[11] The Government has, since March 8, 2016, provided a small amount of additional material, including missing Blue Sheet data and a written record of Mr. Erbek's January 2016 proffer statement described above, as well as some additional account statements and email records.

Against this backdrop, Mr. Wey moves for an Order requiring the Government promptly to provide a bill of particulars consistent with the requests contained herein, identify the documents upon which it will rely at trial, identify and produce *Brady*/*Giglio* material, and, by no later than December 6, 2016, produce 3500 material and its witness list.

ARGUMENT

I.

THE GOVERNMENT MUST
PROVIDE A BILL OF PARTICULARS

The Government should be required to provide a bill of particulars in this case because "the charges of the Indictment are so general [ ] they do not advise the defendant of the specific acts of which he is accused." *See United States v. Bin Laden*, 92 F. Supp. 2d 225, 233(S.D.N.Y 2000); *see also* Fed. R. Crim. P. 7(f). The Sixth Amendment provides every criminal defendant the right "to be informed of the nature and cause of the accusation." U.S. Const. Amend. VI. As this Court has explained, "the function of a bill of particulars is to provide [a] defendant with information about the details of the charge against him if this is necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial." . *Bin Laden*, 92 F. Supp. 2d at 233 (internal quotation marks omitted) (alteration in original). "A bill is appropriate to permit a defendant to identify with sufficient particularity the nature of the charge pending against him, thereby enabling defendant to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted a second time for the same offense." *Davidoff*, 845 F.2d at 1154; *see also* Fed. R. Crim. P. 7(f) (empowering the court to direct the Government to file a bill of particulars upon motion of the defendant).

Mr. Wey reserves his rights with respect to all other matters addressed in the March 8 discovery letter, as the Government has failed to provide a response to nearly every request. The defense further reserves its rights to seek additional discovery to the extent such requests are merited by the Government's future factual assertions or discovery.

In a complex case such as this, a bill of particulars is warranted because "the potential for unfair surprise and the difficulty of preparing a defense are amplified." *See United States v. Rajaratnam*, 09-CR-1184, 2010 U.S. Dist. LEXIS 70385, at *4 (S.D.N.Y. July 13, 2010); *see also United States v. Bortnovsky*, 820 F.2d 572 573 (2d Cir. 1987) (reversible error where District Court failed to grant bill of particulars in fraud case). Both the Constitution requires, and the Federal Rules of Criminal Procedure provide, that the Government provide further detail informing Mr. Wey of the charges against him.

As set forth below, the particulars requested by Mr. Wey fall into two general categories: information relating to purported criminal acts and information relating to individuals purportedly involved in the criminal acts alluded to in the Indictment.

A. The Government Must Identify the Allegedly Criminal Conduct

The complexity of this case, the ambiguity of the Indictment, and the volume of discovery each independently warrant granting Mr. Wey's request for a bill of particulars.

1. The complexity of the Government's allegations warrants a bill of particulars.

The Indictment alleges, in very general terms, a complex securities, wire fraud, and money laundering scheme involving the manipulation of three separate publicly-traded stocks over the course of five years. Indeed, the Government has already stated that it expects the trial in this action to last four to six weeks and has openly acknowledged the unusual complexity of this case. Courts routinely require the Government to provide a bill of particulars in cases such as this for, among other reasons, the high risk of prejudicial surprise at trial and the difficulty of preparing a defense. *See, e.g., Rajaratnam*, 2010 U.S. Dist. LEXIS 70385, at *4-5 ("in complex conspiracy cases like this one, the potential for unfair surprise and the difficulty of preparing a defense are amplified"); *Davidoff*, 845 F.2d at 1151 (bill of particulars warranted in complex RICO prosecution); *Bortnovsky*, 820 F.2d at 575 (District Court erred by denying request for bill of particulars seeking which insurance claims the government contended were false); *Bin Laden*, 92 F. Supp. 2d at 235 (bill of particulars request granted due to complexity of case); *United States v. Lino*, 00-CR-632, 2000 U.S. Dist. LEXIS 18753, at *12-23 (S.D.N.Y. Jan. 2, 2001) (bill of particulars request granted in alleged conspiracy case); *United States v. Savin*, 00-CR-45, 2001 U.S. Dist. LEXIS 2445, at *10 (S.D.N.Y. Mar. 7, 2001) (Bill of particulars request granted where "[t]he indictment alleges that Savin pilfered his client's money through an unspecified series of 'intercompany transfers' without identifying the amounts, dates, means, corporate entities, or co-conspirators involved."); *United States v. Nachamie*, 91 F. Supp. 2d 565, 571-72 (S.D.N.Y. 2000) (bill of particulars request granted where government "has not yet informed the defendants which of these [Medicare] claims were false and in what way they were false").

Here, the Indictment makes reference (albeit passing) to a hodgepodge of theories that supposedly add up to an illegal market manipulation conspiracy. There are generalized references to, among other things, use of multiple entities and individuals around the world as nominees (Siegal Decl., Ex. A, ¶ 8); complex reverse merger transactions involving publicly traded "Shell" companies and China-based operating entities (*id.*, ¶¶ 8, 10); involvement of Swiss financial service professionals and overseas bank and trading accounts (*id.*, ¶¶ 3, 9); use of management-shareholder lockup agreements (*id.*, ¶ 11); violations of regulatory reporting requirements relating to shareholdings of greater than five percent for public issuers (*id.*, ¶ 14); violations of public exchange listing requirements (*id.*, ¶ 17); discussions of technical financial investment concepts like "public float," "investor base," market "depth and liquidity," "round-lot" shareholdings, purchasing of securities "on margin," "touting" of stocks; "initial offering price," "artificially inflated" stock prices and "match trades" (*id.*, ¶¶ 7-25); solicitation by retail brokers of purchases of stock while discouraging sales to "artificially maintain" a stock's price (*id.*, ¶ 18); and the movement of funds between and among overseas accounts (*id.*, ¶¶ 21-22).In short, this is no simple false statements case or even a relatively discreet insider trading claim. Even among various forms of securities fraud, the general allegations of this Indictment are among the most complex imaginable. Accordingly, a bill of particulars is should be ordered.

2. *The ambiguity of Indictment warrants a bill of particulars.*

A bill of particulars is further warranted where, as here, "the charges of the indictment are so general that they do not advise [Mr. Wey] of the specific acts of which he is accused." *See Savin*, 2001 U.S. Dist. LEXIS 2445, at *11 (indictment insufficient where it "does not provide detailed notice of the conspiracy allegations and the means and methods of the conspiracy"); *Bin Laden*, 92 F. Supp. 2d at 235 (bill of particulars warranted where "the allegations contained in the 'Overt Acts' section of the Indictment are cast in terms that are too general, in the context of this particular case, to permit the Defendants to conduct a meaningfully directed investigation of the relevant facts and circumstances and be prepared to respond to the charges"). Despite the fact that the Indictment spans 23 pages, the majority of the document is devoted to mere charging language. And while it asserts that Mr. Wey allegedly participated in manipulating three different securities over a five year time span, *the Government only identifies two transactions*, relating to only one of the issuers that could ever be considered to be "manipulative." The Indictment's patent lack of specificity, too merit a bill of particulars.

For example, the wire fraud count (Count Four) does not specify what wires are at issue (nor are those wires specified elsewhere in the document). The defense is thus completely unable to challenge, among other things, whether this Court has venue over any such wires, whether the statute of limitations has run with respect to any such wires, whether any such wires would satisfy federal criminal jurisdictional requirements, or whether any such wires could be tied to Mr. Wey, much less whether any such wires furthered the alleged fraud. *See, e.g., United States v. Bunn*, 154 F. App'x 227, 229 (2d Cir. 2005) (finding interstate communication is an element of the wire fraud statute); *United States v. Martin*, 411 F. Supp. 2d 370, 376 (S.D.N.Y. 2006) (requiring establishment of venue over sending or receipt of wire transmission); *United States v. Carollo*, 10-CR-654, 2011 WL 3875322, at *2 (S.D.N.Y. Aug. 25, 2011) (dismissing wire fraud count for failure to allege facts within the five year statute of limitations period); *United States v. Shellef*, 507 F.3d 82, 107 (2d Cir. 2007) (holding an essential element of wire fraud is the use of wires to further the scheme).

Moreover, Count Four alleges, in a circular fashion, that the wire fraud scheme was, "to wit," that Mr. Wey and his coconspirator sent wires in furtherance of "a scheme to manipulate the market price and demand for the common stock of SmartHeat, Deer, *and* CleanTech." (Siegal Decl., Ex. A, ¶ 32 (emphasis added)). The wire fraud count fails to describe what the alleged misrepresentation(s) were, or what the otherwise deceptive conduct was, that constituted the wire fraud. The defense cannot possibly challenge the allegations on grounds such as lack of falsity, lack of fraudulent intent, good faith, or reliance on advice of professionals if it is not notified of what the purported fraudulent behavior at issue was, or how any wire or radio transmissions furthered such fraud. *See e.g., United States v. Dupre*, 339 F. Supp. 2d 534, 539 (S.D.N.Y. 2004) (holding that fraudulent intent is an essential element of the crime of wire fraud and that, "even false representations or statements or omissions of material facts do not amount to a fraud unless done with fraudulent intent"); *United States v. Scully*, 14-CR-208, 2016 WL 1069072, at *3 (E.D.N.Y. Mar. 16, 2016) (applying advice of counsel defense to wire fraud charge); *United States v. Lesniewski*, 11-CR-1091, 2013 WL 3776235, at *3 (S.D.N.Y. July 12, 2013) ("materiality is an element of the federal . . . wire fraud statute[]").

The Government's failure to provide this information is "inconsistent with the presumption of innocence" and "smacks of gamesmanship." *See United States v. Trie*, 21 F. Supp. 2d 7, 21-22 (D.D.C. 1998). Mr. Wey is not making some idle request. To the contrary, the Government has forced Mr. Wey to unnecessarily waste time and his counsel's resources poking blindly through discovery, and now briefing this motion, to receive particulars to which he is constitutionally entitled:

> A defendant faced with false statements charges should not have to waste precious pre-trial preparation time guessing which statements he has to defend against or which contributors may be witnesses against him at trial when the government knows precisely the statements on which it intends to rely and can easily provide the information.

Id. (Government ordered to provide a bill of particulars detailing "exactly what the false statements are, what about them is false, who made them, and how [defendant] caused them to be made.").

Similarly, the securities fraud counts (Counts Two and Three) do not specify the purported criminal activity that constituted use of instrumentalities of interstate commerce or the facilities of a national securities exchange to execute a scheme or artifice to defraud, or to make untrue statements of material fact, or engage in any other act or practice that would operate as a fraud. 17 CFR § 240.10b-5. All Count Two provides is that Mr. Wey and his co-conspirator amassed and concealed ownership interest in excess of five percent of each of the three issuers, "and manipulated and caused to be manipulated the market price and demand" for their stock. (Siegal Decl., Ex. A, ¶ 28) While it is difficult to imagine an allegation more opaque than that, one only need look at the very next count, Count Three, which alleges securities fraud pursuant to 18 U.S.C. § 1348 for, "to wit," "the common stock of SmartHeat, Deer and CleanTech." (Siegal Decl., Ex. A, ¶ 30) The Indictment appears here to be a deliberate attempt by the

Government to hide its cards, in an effort to evade any defenses relating to any particular alleged actions on, *inter alia*, jurisdictional, venue, statute of limitations, lack of falsity, lack of fraudulent intent, good faith or causational grounds. This is vital to Mr. Wey's defense of this action because of, among other things, (a) the staleness of much of the alleged conduct, (b) the fact that much of the alleged conduct occurred outside the United States, (c) the fact that much of the alleged conduct is not attributed to Mr. Wey, and (d) the fact that these three stocks were highly liquid, broadly traded stocks, held by some of the wealthiest and most sophisticated and powerful institutional investors on the planet – and thus unlikely subjects of a stock manipulation scheme.

In fact, even the actual allegations made with respect to CleanTech – the one issuer to which any specific alleged acts are related – are tenuous at best. The allegation that a February 7, 2011 email exchange purportedly between Mr. Wey and Mr. Erbek is evidence of market manipulation, has already been directly rebutted by *Brady* evidence produced by the Government that it obtained subsequent to the Indictment.[12] The Government met and interviewed Mr. Erbek[13] (apparently for the first time) *in January 2016* despite *five years* of investigation. Mr. Erbek, who apparently spoke to the Government without the protection of any proffer agreement, stated that this allegation is demonstrably false for at least two reasons: (i) Mr. Wey's Sibling – *not* Mr. Wey – was Mr. Erbek's client, and Mr. Erbek understood this email came from her or someone in China acting on *her* behalf, *not* Mr. Wey (Erbek also denied entering any conspiracy with Mr. Wey), and (ii) Wey's sibling's instruction was for *a routine limit order* and was *treated as such* by Mr. Erbek *and* the financial institution that executed the instruction. In other words,

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12 This email exchange is also alleged as the only overt acts of the Government's conspiracy charge (Count 1). (Siegal Decl. Ex. A, ¶ 26)

13 We have not submitted with this motion the entire 302 of Mr. Erbek's proffer that was provided by the Government for various reasons, but we are happy to provide it at the Court's request.

the email interaction was simply a request to place a limit order to purchase 1,000 shares of a stock worth a total of no more than $5,000 in a company that had 25 million shares outstanding. As such, it would not have manipulated anything.[14]

Further, the allegation that Mr. Wey caused "two retail brokers . . . to solicit customers to buy shares" and "discouraged the sales of these stocks" is so vague as to be empty. (Siegal Decl., Ex. A, ¶ 18) The Government fails to identify the "two retail brokers," fails to describe a time frame for this activity (beyond the "between 2007 and 2011" broader time frame of the Indictment), fails to specify which stocks those brokers were pitching, fails to allege *how* the market price of any securities was effected, and, most importantly, fails to allege how Mr. Wey was purportedly involved with these brokers or "caused" them to do anything, much less anything fraudulent or manipulative. The Government merely alleges that based on these supposedly "manipulative" activities, Mr. Wey sold stock in SmartHeat, Deer, and CleanTech, and profited.

Given the sparseness of these allegations, and the fact that the only transactions identified concern only one of the three stocks at issue, it is inconceivable that that the Government does not already have in mind additional, specific transactions that it intend to prove up at trial. Mr. Wey is entitled to be apprised of such other allegations in order to prepare a defense to market manipulation charges.

The money laundering counts (Counts Seven and Eight) are also absurdly vague. They charge that over a five year period, Mr. Wey broke the law by moving *or* causing to be moved

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[14] Similarly, the allegation of a 1,000 share "match" trade in CleanTech, and an alleged "tout" by Mr. Wey also fail to support a market manipulation claim. *First*, it is highly unlikely that an isolated 1,000 share trade could possibly manipulate the market price for any NASDAQ stock. *Second*, the alleged "tout" email merely reports, *accurately* and innocuously, the price at which the stock initially traded: "CleanTech Innovations, Inc. (www.ctiproduct.com), wind power and clean energy solutions. The highly profitable company is based in China's northeast. Stock symbol: EVCPD, last trade $5.1 SEC filing 8k attached, filed before market opened this morning."

"millions of dollars from the sale of SmartHeat, Deer *and* CleanTech stock through various accounts located in the United States and overseas before repatriating that money to the United States." (Siegal Decl., Ex. A, ¶¶ 28, 30 (emphasis added)) What transfers? Which accounts? When? What locations? Which of the hundreds of account statements in accounts held in the names of dozens of third parties and the tens of thousands of money transfers within those statements is the Government referring to? None of the answers to any of these questions are even hinted at. Without this information, the defense is utterly at a loss to defend against these allegations.

The counts charging failure to file 13D disclosures (Counts Five and Six) also suffer from a surprising lack of specificity. While each is directed at one stock – Count Five for Deer and Count Six for CleanTech – each purports to cover *at least one year* of time. (Siegal Decl., Ex. A, ¶¶ 34, 36) The charges do not make clear whether the defense should presume that the allegation is that Mr. Wey failed to file a 13D on every day during that period, or merely at some point during that period. If the latter, the defense is forced to guess what date (or approximate date) Mr. Wey purportedly crossed the 5% threshold and failed to report it. Nowhere does the Indictment identify what account holding(s) the Government intends to prove triggered such obligation, or when. The Government's position is, effectively, that the defense must piece together those answers from the millions of puzzle pieces scattered throughout the Government's document productions. This is patently unfair.[15]

[15] A review of other indictments in this District and the Eastern District of New York reveals how facially deficient this Indictment is by comparison to other financial fraud cases. *See, e.g., United States v. Vilar*, 05-CR-00621 (S.D.N.Y.) (identifying by date, sender, recipient, and description a single wire and a single use of the mails for each of the wire/mail fraud counts, and 26 overt acts of the conspiracy); *United States v. Levis*, 08-CR-00181 (S.D.N.Y.) (providing a chart identifying each allegedly wrongful wire by date, from, to, and description and maintains a separate count for each wire); *United States v. Bennett*, 05-CR-1192 (S.D.N.Y.) (similar chart); *United States v. Shkreli*, 15-CR-00637 (E.D.N.Y.) (list of overt acts and detailed factual allegations).

The Government cannot attempt to insulate itself from legitimate challenge to its case by masking the details of its allegations in a fog of generalities until trial. Such a practice violates the very fundamental precepts of our justice system. Beyond making it virtually impossible to prepare to present an evidentiary defense, it makes it close to impossible to engage in meaningful debate about *inter alia* jury instructions, *voir dire* and motions *in limine*. In short, Mr. Wey cannot prepare a defense if it does not know against what it is defending.

3. *The volume of discovery provided by the Government warrants a bill of particulars.*

The volume of discovery further compels a bill of particulars here. The defense cannot effectively review this volume of material without a more particularized understanding of the Government's allegations. While a production of this size is perhaps to be expected in a case involving the complexities suggested by the Indictment, it does not obviate the Government's duty to give meaningful disclosure. *See, e.g., Lino*, 2000 U.S. Dist. LEXIS 18753, at *12-23 (requiring Government to provide a bill of particulars, noting that "the Government does not fulfill its obligations merely by providing mountains of documents to defense counsel who were left unguided as to the nature of the charges pending"); *Savin*, 2001 U.S. Dist. LEXIS 2445, at *11-12 ("the fact that the Government has obligations under *Brady* does not mean that it may meet its obligation to provide adequate notice of the charges merely by providing mountains of documents").

As noted above, the Government has produced information regarding millions of securities trades, but has not identified the alleged manipulative trading underlying its market manipulation theories (unless it intends to rely solely on the two CleanTech trades it does identify). Similarly, the Government has produced tens, if not hundreds, of thousands of emails and bank and brokerage statements, along with countless phone records, but has not identified a single wire transmission constituting its wire fraud charges.

The volume of data produced by the Government in the instant action easily eclipses the number of documents produced in other cases where a bill of particulars was ordered. *See, e.g., Savin*, 2001 U.S. Dist. LEXIS 2445, at *3 (granting request for a bill of particulars where Government produced 100,000 pages of discovery); *Nachamie*, 91 F. Supp. 2d at 571-72 (granting bill of particulars where Government had produced 200,000 documents relating to Medicare claims, but had not told the defendants which claims were alleged to be false).

Moreover, in *Rajaratnam*, unlike here, the Government had already "identified the trades at issue in the substantive counts." 2010 U.S. Dist. LEXIS 70385, at *7. Nonetheless, the court *still* granted the defendants' request for a bill of particulars, due to the voluminous nature of discovery. *Id.* ("[T]he production of this material does not necessarily obviate the need for a bill of particulars. The Government may not rely solely on the quantity of information disclosed; sometimes, the large volume of material disclosed is precisely what necessitates a bill of particulars.") (internal citation marks omitted).

4. *Mr. Wey's request is tailored to details that are necessary to prepare his defense and avoid surprise at trial.*

Mr. Wey's request is tailored to discrete categories of information that are necessary in the preparation of his defense to the charges, and to avoid surprise at trial. Mr. Wey can only prepare to defend a fraud claim if he is on notice of his alleged misrepresentations. *See Bortnovsky*, 820 F.2d at 575 (granting retrial where District Court failed to grant bill of particulars requiring Government to identify the allegedly fraudulent documents and the dates of the allegedly fraudulent activities); *Lino*, 2000 U.S. Dist. LEXIS 18753, at *12-23 (requiring Government to provide a bill of particulars after "a request to particularize allegations of false statements, which courts routinely award," and "order[ing] the filing of particulars directed to the details of misrepresentations or fraudulent acts").

Likewise, Mr. Wey can only prepare to defend a market manipulation claim if he is on notice of the allegedly manipulative trades and activities. *See Savin*, 2001 U.S. Dist. LEXIS 2445, at 10 (granting request for particulars about defendant's role in transactions, where defendant would otherwise be forced to "comb through" thousands of pages of documents to "attempt to guess at" which investment transactions, during a six-year period, were allegedly improper).

Mr. Wey can only defend a conspiracy charge if he is aware of the nature of the agreement, scope of the conspiracy, and alleged overt acts. *See Davidoff*, 845 F.2d at1151 (retrial granted where District Court failed to grant defendant's request for bill of particulars relating to alleged conspiracy). The Government has only identified one alleged overt act – a single email exchange relating to a limit order in CleanTech stock. (Siegal Decl., Ex. A, ¶ 18) If the Government intends to pursue additional overt acts at trial, it must provide Mr. Wey with notice of these incidents, so he can prepare a defense. *See, e.g.*, *Rajaratnam*, 2010 U.S. Dist. LEXIS 70385, at *12-13 (for conspiracy to commit insider trading count, requiring Government to "identify (1) all reporting periods that were the subject of inside information, (2) the substance of the information provided for any period, and (3) the date(s) on which it was conveyed"; *Savin*, 2001 U.S. Dist. LEXIS 2445, at *11 (Government must detail the "the means and methods of the conspiracy"); *Bin Laden*, 92 F. Supp. 2d at 236 (Government must provide details of alleged overt acts where "the charged conspiracies involve a wide range of conduct, occurring over a long period of time").

Mr. Wey can only prepare a defense of wire fraud charges if he is on notice of the allegedly wrongful wires. *See Bortnovsky*, 820 F.2d at 575 ("appellants were hindered in preparing their defense by the district court's failure to compel the Government to reveal crucial information: . . . the identity of the three fraudulent documents.").

Finally, the Indictment also presents several vague allegations that Mr. Wey "caused" others to act deceptively or wrongfully. Mr. Wey can only defend against these allegations if he is on notice of how he allegedly "caused" others to act. *See United States v. Hsia*, 24 F. Supp. 2d 14, 32 (D.D.C. 1998) ("[T]he government still has not provided a coherent explanation of how Ms. Hsia 'caused' those false statements to be made. Accordingly, the Court will order a bill of particulars disclosing how Ms. Hsia is alleged to have caused each of the false statements to be made."); *see also Trie*, 21 F. Supp. 2d at 22 (Government must provide details of how defendant "*caused* [false statements] to be made") (emphasis added).

Mr. Wey therefore requests that this Court enter an Order requiring the Government to provide the following particulars:

1. Information sufficient to identify each allegedly false or misleading statement or representation referenced or alluded to in the Indictment, including but not limited to at least:
    a. the content of the alleged factual statement or representation
    b. when the statement or representation was made
    c. who made the statement or representation
    d. to whom was the statement or representation made
    e. any other information necessary to identify the statement or representation sufficient for the defense to be on proper notice of the claim of misrepresentation.

2. Information sufficient to identify each allegedly manipulative trade affecting a stock price, including but not limited to at least:
    a. the date and time of the alleged trade(s)
    b. the identity of the trading party(ies)
    c. the stock ticker symbols of the alleged trade(s)
    d. the quantity of shares traded
    e. how the trading activity allegedly artificially manipulated the share price.

3. Information sufficient to identify each act that allegedly manipulated the "demand for the stock of those companies," including but not limited to at least:
    a. the date on which these alleged acts occurred
    b. the manner in which these acts is alleged to have affected demand for the stock.

4. Information sufficient to identify the wire transmissions that allegedly constitute wire fraud, including but not limited to at least:
    a. the date and time of the alleged wire(s)
    b. the nature or kind of wire transmission (fax, email, telephone call, fund wire, or other)
    c. the sender, recipient, and location(s) for each.

5. Information sufficient to identify all acts of alleged money laundering, including but not limited to at least:
    a. the date and time of each allegedly offending financial transaction
    b. the sender, recipient and location(s) for each
    c. the amount of money allegedly laundered, and currency type
    d. the asserted basis that each constituted a prohibited financial transaction.

6. Information sufficient to identify each act or circumstance that allegedly constituted a failure by Mr. Wey to make a public filing required by Section 13(d) of the Exchange Act (15 U.S.C. § 78m(d)) and/or Regulation 13d-1 thereunder (C.F.R. § 240.13d-1), including but not limited to at least:
    a. the date or date range
    b. the identity of the issuer(s) involved
    c. the identity (name and/or account information) of the relevant purported "nominee" holder(s).

7. Information sufficient to identify the alleged "match trades" discussed in the Indictment, including but not limited to at least:
    a. the date and time of the alleged trade(s)
    b. the stock ticker symbols of the alleged trade(s)
    c. the number of shares traded
    d. the price at which the shares traded
    e. the identity of the trading parties.

8. The time and date of each alleged overt act in furtherance of the alleged conspiracy.

9. All information the Government intends to rely on to show the existence of an agreement between or among the alleged conspirators.

10. All statements the Government intends to characterize as co-conspirator statements purportedly admissible pursuant to F.R.E. 801(d)(2).

11. Information sufficient to put the defense on notice of how Mr. Wey allegedly *"caused"* "Nominees" to hold money and/or securities for his personal benefit.

12. Information sufficient to put the defense on notice of how Mr. Wey allegedly *"caused"* "Operating Companies" to merge with "Shell Companies."

13. Information sufficient to put the defense on notice of how Mr. Wey allegedly *"caused"* the management of Deer Consumer Products, CleanTech Innovations, and SmartHeat to secure a listing on NASDAQ.

14. Information sufficient to put the defense on notice of how Mr. Wey allegedly *"caused"* these "two retail brokers" to "to solicit their customers to buy shares of common stock of the Issuers."

15. Information sufficient to put the defense on notice of how Mr. Wey allegedly "deceptively *caused* shares of some of the Issuers to be transferred . . . as gifts or unsolicited bonuses."

16. Information sufficient to put the defense on notice of the dates, quantity and price, and identity of the customers who purchased shares of CTEK, DEER and/or HEAT through or from the "two retail brokers" described in the Indictment.

B. The Government Must Identify the Individuals Referenced in the Indictment

The Indictment alleges that Mr. Wey was part of a long-term conspiracy, with several other individuals "known and unknown," including "two retail brokers," and "round-lot shareholders" (some of whom purportedly did not receive share certificates, and others who purportedly were unaware of their stock holdings), but has failed to identify anyone beyond those vague references. (Siegal Decl., Ex. A, ¶¶ 7, 16, 18) It is impossible for Mr. Wey to discern the Government's claims from these references, nor is Mr. Wey practically able to comb through vast discovery materials in order to gain clarity on these matters. Mr. Wey cannot prepare defense to a conspiracy charge without knowing the identity of his alleged co-conspirators. Similarly, Mr. Wey cannot prepare a defense against allegations that he "caused two retail brokers . . . to solicit customers," without knowing the identity of these alleged "retail brokers." Finally, Mr. Wey cannot defend allegations that certain "round-lot shareholders" did not receive their share certificates and that others were unaware of their holdings, without knowing the identity of these alleged shareholders.

In *Nachamie*, the court identified six factors to consider in determining whether disclosure of unindicted co-conspirators is required:

> (1) the number of co-conspirators; (2) the duration and breadth of the alleged conspiracy; (3) whether the Government otherwise has provided adequate notice of the particulars; (4) the volume of pretrial disclosure; (5) the potential danger to co-conspirators and the nature of the alleged criminal conduct; and (6) the potential harm to the Government's investigation.

91 F. Supp. 2d at 572. Each of these factors weighs in favor of granting Mr. Wey's request. First, the Indictment does not provide a number of co-conspirators, but appears to suggest that each aspect of the alleged scheme involved one or more co-conspirators. The Government lists at least several categories of potential conspirators, including "retail brokers," "round-lot shareholders," and "Nominees" (not to mention the catchall "others known and unknown"). Second, the conspiracy is alleged to have occurred from 2007 through 2011. Not only is this a long span, it is a long time ago. The government will be presenting evidence of a conspiracy that allegedly occurred *10 years prior to trial*. Third, as discussed throughout this submission, the Government has largely avoided providing any particulars regarding the crimes. Fourth, as addressed herein, the volume of disclosure is almost unimaginably large. Fifth, this is not a crime of violence, nor has Mr. Wey has ever been arrested for any crime of violence. Sixth, the Government has already been investigating for at least five years, and there is no reason to believe that providing this information now, rather than on the eve of trial, will in any way impede the Government's investigation.

Mr. Wey can only adequately prepare a defense if he is provided with the identities of the individuals who are referred to in the Indictment. *See, e.g., Nachamie*, 91 F. Supp. 2d at 572-73 (requiring Government to provide bill of particulars identifying alleged co-conspirators); *United States v. Failla,* CR-93-00294, 1993 U.S. Dist. LEXIS 18507, at *19-20 (E.D.N.Y. Dec. 21,

1993) ("The request for the names of unindicted co-conspirators is a fairly common request and one that is generally granted by the district courts.").

In *Bin Laden*, the Court granted the defendant's bill of particulars request based on the length of the conspiracy, the number of unidentified individuals referenced in the indictment, and the volume of discovery:

> the conspiracies alleged here were quite long-running (nearly ten years, and allegedly ongoing) and involved a large number of co-conspirators (at least 20 individuals). Discovery has been, consequently, extremely voluminous. . . . A bill of particulars revealing the names of all persons whom the Government will claim at trial were unindicted co-conspirators might, therefore, be necessary to prevent prejudicial surprise at trial.

92 F. Supp. 2d at 241. Each of the factors identified in *Bin Laden*, compel the same conclusion in this case.

Finally, no purpose would be served by permitting the Government to withhold this information until trial. Assuming *arguendo* that Mr. Wey was part of a conspiracy, he would presumably know the identities of the persons with whom he conspired and the persons used as instruments of his crimes. The Government's reluctance to furnish this information serves only to hinder Mr. Wey in the preparation of his defense, not further any legitimate law enforcement concerns. In *United States v. Failla*, the court granted a similar request:

> [T]he Government is directed to file a bill of particulars separately stating, with respect to each defendant and with respect to each paragraph of the indictment in which the word 'others' appears, the identity of the person or persons referred to by the expression 'others,' if known to the grand jury or to the Government, in any count in which the Government will contend at trial that that person was either (a) a co-conspirator of the defendant or (b) a person aided and abetted by the defendant.

1993 U.S. Dist. LEXIS 18507, at *20-21; *see also Trie*, 21 F. Supp. 2d at 22 ("The Court concludes that the requested disclosure is necessary to allow Mr. Trie to adequately prepare for trial and that he is entitled to immediate disclosure of the names. Furthermore, the government is required to provide the names of all alleged co-conspirators regardless of whether they will be called as witnesses at trial.”).

Accordingly, the Government should be ordered promptly to furnish a bill of particulars detailing:

1. The identity of all alleged co-conspirators.
2. The identity of the “two retail brokers” identified in the Indictment
3. The identity of all shareholders who were allegedly recipients of gifted shares.
4. The identity of all shareholders who allegedly did not receive shares.
5. The identity of all shareholders who allegedly did not know they owned shares.

II.

THE GOVERNMENT SHOULD BE ORDERED TO PRODUCE AND IDENTIFY *BRADY* AND *GIGLIO* MATERIAL

The Government must immediately produce and identify all *Brady* and *Giglio* material. “*Brady* and its progeny require the Government to disclose material information that is ‘favorable to the accused, either because it is exculpatory, or because it is impeaching.’” *United States v. Rodriguez*, 496 F.3d 221, 225 (2d Cir. 2007) (emphasis added). Indeed, even if the Government believes that information in its possession is inculpatory, that information may not be “necessarily truthful, accurate, or complete,” in which case it is subject to the Government’s *Brady* obligations. *Id*; *see also Kyles v. Whitley*, 514 U.S. 419, 439-40 (1995); U.S.A.M. § 9-5.001(B)-(C).

A. The Government Must Immediately Produce All *Brady/Giglio* Material

To date, the Government has identified only three pieces of *Brady* material: (i) “a disc containing a videotape of William Scholander’s September 10, 2015, post-arrest statement

(Bates-marked USAO_BW 000128743), in which Scholander, in substance and in part, denies participation in any criminal activity involving Benjamin Wey"; (ii) "notes of an October 20, 2015 meeting with Marc Litt, Esq., counsel for defendant Dogan Erbek;"[16] and (iii) "Notes taken at [a] January 14, 2016 proffer of Dogan Erbek."

Given the nature of this case, the complexity of the allegations, and the dozens, if not hundreds, of potential individuals and entities that *must* have been contacted by the Government during its five year investigation. It is inconceivable that the only *Brady/Giglio* material in the Government's possession are the three items it has produced to date – *all* of which were obtained by the Government *after* Mr. Wey's indictment. For example, has the Government never interviewed any of the alleged unindicted co-conspirators? Have none of these alleged co-conspirators provided exculpatory information in the context of those interviews? Did the Government interview any of the market analysts at the institutional investment firms who issued numerous positive market reports about SmartHeat, Deer, and CleanTech? Have none of those interviews yielded information at odds with any aspect of the Government's sprawling case theory(ies)?

It is inconceivable that, apart from Erbek and Scholander, there are no other witnesses who provided the Government with any exculpatory information. The Government must review and produce notes and memoranda prepared by FBI agents and AUSAs, as well as notes of SEC personnel, when conducting interviews or meetings with individuals or entities during the course

[16] According to the Government's own summary, Mr. Erbek's counsel stated that Mr. Erbek "believed the person with whom he was communicating by email . . . was Tianyi [*i.e.,* Sarah] Wei (probably through interpreters, since her English was poor); he did not believe that he or Tianyi [Sarah] Wei or his other clients were violating the 5% rule; Erbek traveled to China to meet with Tianyi [Sarah] Wei without Benjamin Wey present in May 2012 and April 2013; Erbek never received any trading authorization from anyone related to any of the companies the Government has identified as nominee entities; a February 7, 2011 email exchange concerning CleanTech stock which is referenced in the Indictment and the SEC complaint related to a limit order and not to any stock price manipulation; and, relatedly, when Erbek instructed 'Sarah [Sarah] Wei' in a February 7, 2011 to 'be careful to give such orders I make such comments,' he meant that she should be careful not to use such a commanding tone with Credit Suisse representatives." (Siegal Decl., Ex. B)

of the investigation, to the extent they contain any *Brady*/*Giglio* material. *See, e.g., United States v. Triumph Capital Grp., Inc.*, 544 F.3d 149, 161-62 (2d Cir. 2008) (conviction overturned where Government failed to disclose interview notes taken by FBI that contained *Brady* material); *United States v. Gupta*, 848 F. Supp. 2d 491, 495-96 (S.D.N.Y. 2012) ("Brady, however, requires more than assuming that no new exculpatory information will be found. There is no transcript that serves as a complete and accurate record of what was said at these interviews. The SEC attorney may have chosen to emphasize other parts of the witness interviews in his memoranda that did not make it into the FBI agent's notes, or that the Government attorneys present simply forgot, and those may qualify as Brady material.").

Moreover, the Government must provide such information promptly, not on the eve of trial, and even if it does not intend to call such witnesses at trial. *See Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001) (holding the government's failure to disclose name of witness with potentially exculpatory evidence until the "eve of trial" constituted a *Brady* violation); *see also United States v. Khanna*, 97-CR-407, 1998 WL 67678, at *2 (S.D.N.Y. Feb. 19, 1998) (granting motion pursuant to *Brady* to compel the government to disclose the identity of any person with exculpatory evidence even if it did not intend to call them as a trial witness).

Moreover, to the extent information was provided to or obtained by the Government but not formally recorded, that information must nonetheless be produced. *See Rodriguez*, 496 F.3d at 226 (the Government's "obligation to disclose information covered by the *Brady* and *Giglio* rules exists without regard to whether that information has been recorded in tangible form").

B. The Government Must Identify the *Brady/Giglio* Material Contained in its Production

In addition to any *Brady*/*Giglio* material that has *not* been produced to date, to the extent any such material *Brady*/*Giglio* exists within the more than five (5) *terabytes* of data the

Government has already produced,[17] the Government should be directed to identify such materials for the defense. While the defense has been in possession of most of this material for only a matter of a few months, the Government has been combing through this material for five years, which puts it in a better position to timely identify such material. Merely having handed over the discovery as part of enormous data dumps does not relieve the Government of its *Brady*/*Giglio* obligations.

As it stands, without further assistance and guidance by the Government, finding *Brady*/*Giglio* material in the voluminous discovery materials would amount to uncovering "an exculpatory needle in a haystack of discovery materials." *See United States v. Thomas*, 981 F. Supp. 2d 229, 239 (S.D.N.Y. 2013). Accordingly, the Government should also be ordered to promptly identify, by Bates number, any potentially exculpatory material in its document production pursuant to its *Brady*/*Giglio* responsibilities. *See, e.g., United States v. Gil,* 297 F.3d 93,106 (2d Cir. 2002) (vacating judgment where Government failed to identify *Brady* material in reams of disclosure); *Bortnovsky,* 820 F.2d at 575 ("the Government did not fulfill its [discovery] obligation merely by providing mountains of documents to defense counsel who were left unguided" as to what materials were relevant).

III.

THE GOVERNMENT MUST IDENTIFY THE DOCUMENTS UPON WHICH IT WILL RELY AT TRIAL

Rule 16 provides that, upon the defendant's request, the Government must produce documents if "the government intends to use the item in its case-in-chief at trial." Fed. R. Crim. P. 16(a)(1)(E)(ii). Mr. Wey previously requested all Rule 16 materials, and he reiterates this

[17] While difficult to even estimate the number of files, due to the large volume of discovery, we believe the volume exceeds *three million* files. For reference, it would take approximately 6,000 8-hour days to look at 3,000,000 documents a single time.

request here. However, in this case, mere production of these materials is insufficient. Much like the Government cannot satisfy its *Brady* obligations by dumping millions of documents on Mr. Wey, it cannot comply with Rule 16 by simply producing millions of documents without identifying those documents on which it will rely at trial. Accordingly, in cases like this, Courts have required the Government to identify the documents upon which it *will* – not *may* – rely at trial. *See United States v. Upton*, 856 F. Supp. 727, 747-48 (E.D.N.Y. 1994).

In *United States v. Turkish*, 458 F. Supp. 874 (S.D.N.Y. 1978), the Court ruled that former Rule 16(a)(1)(C)'s (the predecessor to 16(a)(1)(E)) requirement that the Government produce all documents that "are intended for use by the government as evidence in chief at the trial" justified requiring the Government to identify such documents in its 25,000 document production in a case that alleged a trading "conspiracy covering over fifteen months of activity and involv[ing] the entire crude oil market":

> The government is directed, within 14 days of this order, to identify to the defendants those documents which it intends to offer, or to use or to refer to in connection with the testimony of any witness, on its case in chief. It is further required promptly to identify any other documents when and if a decision is made between now and trial to offer or to use or to refer to such documents.

Turkish, 458 F. Supp. at 882. Following *Turkish*, courts have often held that Rule 16 requires the Government to identify documents that it intends to offer at trial where, as here, the volume of production is large and the case is complex. *See, e.g., United States v. Giffen*, 379 F. Supp. 2d 337, 344 (S.D.N.Y. 2004) ("based on the policy concerns of Rule 16 and principles of fairness, it is within a district court's authority to direct the Government to identify the documents it intends to rely on in its case in chief"); *Upton*, 856 F. Supp. at 748 ("The purpose of requiring the government to identify which documents it will rely upon at trial in a situation such as this – where there are thousands of documents – is to allow the defendant to adequately prepare his or her defense. General familiarity with the nature of the documents, as in this case, will not allow defendants to do that if they are not informed which documents include the allegedly falsified maintenance information and which documents the government witnesses will refer to or rely upon.”).

In *United States v. Vilar*, Judge Sullivan reviewed the status of Second Circuit law on this this very issue and granted the defendant’s request ordering the Government to provide its exhibit list:

> [W]hile there is some divergent authority among courts in this Circuit as to whether a district court may compel the Government to specify the sub-set of items produced pursuant to Rule 16 that it intends to offer at trial, the overwhelming majority of district courts, in accord with Second Circuit authority, favor the view that it is within a district court’s authority to direct the Government to identify [prior to trial] the documents it intends to rely on in its case in chief.

530 F. Supp. 2d 616, 639 (S.D.N.Y. 2008) (“based on the large number of documents at issue in this case, and the likelihood that the Government will rely to a significant extent on only a portion of those documents at trial, the Court finds that pre-trial disclosure of an exhibit list best serves Defendants’ right to a fair trial, and is likely to aid in the orderly presentation of the Government’s and the Defendants’ respective cases at trial”) (alterations in original). Based on prevailing Second Circuit law, and in light of the volume of documents produced by the Government and the complexity of this case, the Government must identify for the defense the documents upon which it will rely at trial.

IV.

THE GOVERNMENT SHOULD BE ORDERED TO PRODUCE 3500 MATERIAL AND ITS TRIAL WITNESS LIST BY DECEMBER 6, 2016

Given the complexities of this case, the sheer volume of discovery, and the expected length of the trial (as proffered by the Government), Mr. Wey requests that 3500 (Jenck’s Act) material, as well as the Government's anticipated witness list, be provided to the defense no later than 90 days in advance of trial. It would be severely prejudicial to Mr. Wey if he were forced to prepare to cross examine witnesses in a six week trial based on materials (which will presumably be dense, technical and voluminous) provided at or on the eve of trial. When evaluating a request for early disclosure of the Government's witness list, Courts in this Circuit generally review the factors set forth in *United States v. Turkish*:

1. Did the offense alleged in the indictment involve a crime of violence?
2. Have the defendants been arrested or convicted for crimes involving violence?
3. Will the evidence in the case largely consist of testimony relating to documents (which by their nature are not easily altered)?
4. Is there a realistic possibility that supplying the witnesses' names prior to trial will increase the likelihood that the prosecution's witnesses will not appear at trial, or will be unwilling to testify at trial?
5. Does the indictment allege offenses occurring over an extended period of time, making preparation of the defendants' defense complex and difficult?
6. Do the defendants have limited funds with which to investigate and prepare their defense?

458 F. Supp. 874, 881 (S.D.N.Y. 1978).

These factors clearly weigh in favor of granting Mr. Wey's request. This is a securities trading and banking case involving office buildings, account statements, computer records, and corporate governance. There are no allegations of violence, and Mr. Wey has never been arrested for or convicted of a crime involving violence. The testimony in this case will likely be largely related to documentary evidence – over three million documents have been produced and proof of market manipulation will necessarily rely on highly technical documentary evidence and related data analysis. Further, as discussed herein, the Government's allegations stretch over a five year period and involve allegations that Mr. Wey manipulated the market price of highly liquid NASDAQ-listed securities.

Under these circumstances, the Government should be required to disclose its witness list and 3500 material no later than 90 days in advance of trial. *See United States v. Hernandez*, 2010 U.S. Dist. LEXIS 719, at *20 (S.D.N.Y. Jan. 6, 2010) (Second Circuit requires pretrial disclosure of 3500 material "in complex cases"); *Rajaratnam*, 2011 U.S. Dist. LEXIS 21062, at *2 (Government agreed to produce 3500 materials more than a month prior to trial); *United States v. Barrett*, 15-CR-103, 2015 U.S. Dist. LEXIS 171727, at *54 (E.D.N.Y. Dec. 23, 2015) (ordering Government to produce witness list 45 days prior to trial, because the case "allegedly involves a highly complex health care fraud scheme"); *United States v. Rueb*, 00-CR-91, 2001 U.S. Dist. LEXIS 943, at *23-24 (S.D.N.Y. Feb. 6, 2001) (ordering witness list to be disclosed at least 30 days prior to trial, because, in part, "offenses charged in the indictment spanned a period of approximately three years, which is an extended period of time").

The volume of evidence, the breadth of charges, and the time until trial makes this a truly exceptional case. If the Court grants this request, the Government will nevertheless still maintain the advantage of withholding its witness information from Mr. Wey for *more than 15 months after indictment*. Given the complexity of this case and the probability that a delay in providing the defense with notice of the evidence will potentially engender, and given the vanishingly small risk that evidence or witnesses will be endangered by disclosure, an Order requiring disclosure 90 days before trial is fair and will protect Mr. Wey's right to prepare an adequate defense.

CONCLUSION

Based on the foregoing, Mr. Wey respectfully requests an Order requiring the Government to (i) promptly provide a bill of particulars consistent with the requests herein, (ii) promptly disclose and identify *Brady* and *Giglio* material, (iii) promptly identify the materials it will introduce at trial, and (iv) disclose 3500 material and its witness list by no later than December 6, 2016, together with such other and further relief as it deems just and proper.

Dated: April 29, 2016

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